UNITED STATES
v.
WILLIAM LEONARD GREDIAGIN

IBLA 70-418 Decided July 24, 1972

Appeal from decision (Anchorage 057112) by John R. Rampton, Jr., hearing examiner, directing that patent issue for homestead entry.

Affirmed.

Contests and Protests: Generally -- Rules of Practice: Appeals: Generally -- Rules of Practice: Evidence

Despite factual concessions by counsel for the Government, the Board is not precluded from reviewing the entire record and determining whether, and to what extent, rights have been earned under the public land laws.

Alaska: Homesteads -- Homesteads: Cultivation -- Homesteads: Military Service

Where a homestead entry is made on permafrost lands, for which entry the entryman is entitled to two years credit for his military service, to be allocated to his second and third entry years, and the entryman during his fourth entry year plants no crops, but takes measures to drain the excessive moisture with a view to raising crops in the fifth entry year, and in fact does raise a crop during that year, the cultivation requirements of the homestead laws will be deemed to have been satisfied.

APPEARANCES: James R. Mothershead, Attorney, Solicitor's Office, Department of the Interior, for the appellant; William L. Grediagin, pro se.

OPINION BY MR. FISHMAN

The Bureau of Land Management has appealed from a hearing examiner's decision dated October 22, 1969, which ordered that a patent issue to William Leonard Grediagin for homestead entry, Anchorage 057112.

On May 3, 1962, William Leonard Grediagin filed a notice of location of settlement under the homestead laws embracing an unsurveyed tract of land containing 160 acres in Alaska, pursuant to the Act of April 29, 1950, 48 U.S.C. §§ 371, 371c, 461a (1958). 1/ On December 22, 1966, he filed his homestead final proof.

The Alaska state office of the Bureau of Land Management, by a decision dated January 20, 1967, found that the final proof of the entryman showed the existence of a habitable house, over two years residence, and cultivation of 20 acres in 1966 during the fifth entry year, but that there was no showing of cultivation for the second, third, or fourth entry years. 2/ The decision credited the entryman with cultivation for two years, in accordance with the Act of September 27, 1944, as amended, 43 U.S.C. §§ 279-284 (1964), which provides that creditable military service may be construed as residence and cultivation for a period not exceeding two years. The Alaska state office decision held that the entryman's final proof was defective on its face for failure to show cultivation during the fourth entry year and therefore rejected the final proof of the entryman.

The entryman appealed from that decision to the Director, Bureau of Land Management. The entryman asserted that, with respect to cultivation in the fourth entry year, in the spring of 1965 he could not cultivate his land due to the frozen condition of the moss-covered ground; in the fall of 1965 he root-raked his fields and burned roots but was unable to finish burning roots because the ground was too wet; and in the spring of 1966 he kept getting bogged down and had to abandon his efforts until the fall when the land was more dry.

The decision of the Bureau of Land Management Office of Appeals and Hearings, dated December 4, 1967, noted that no question was raised as to cultivation during the fifth entry year and that, in fact, a field examiner reported that there was a crop during the fifth entry year. The decision viewed the sole remaining issue in the case as whether or not or to what extent the work done by claimant during the fourth entry year constituted an acceptable method of preparing the soil for cultivation in the area under the climatic conditions pre!

1/ Now found in 43 U.S.C. §§ 270, 270-5, 270-6, 270-7, and 687a (1970).

2/ The homestead law, 43 U.S.C. § 164 (1970), and the Alaska homestead regulations promulgated thereunder, 43 CFR 2567.5(b) (1972) [formerly 43 CFR 65.17(b) (1962)] provide that there must be cultivation of 1/16 of the area of the claim the second year and 1/8 of the area during the third year and until submission of final proof. Thus the entryman was required to show cultivation of 10 acres during the second entry year and 20 acres thereafter. The entry year for Mr. Grediagin was from May 3 through May 2 of each year, with the first entry year being from May 3, 1962, through May 2, 1963.

vailing where the land is situated. The case was therefore remanded to the Bureau's state director, Alaska, to order a hearing on the issue of cultivation during the fourth entry year.

The hearing on remand was held on September 18, 1968, at Anchorage, Alaska. The hearing examiner's decision limited his ruling to the question of whether the method of cultivation employed by the claimant during the fourth entry year satisfied the requirements of the homestead laws in view of the particular type of land involved and the climatic conditions prevailing. The hearing examiner found that the appellee cultivated the land during the fourth entry year "in the only manner possible under the weather and climatic conditions prevailing calculated to produce profitable results," and therefore the appellee complied with the regulations. The examiner ordered that a patent issue to the appellee.

The Bureau contends on appeal that (1) the hearing examiner erred in not considering the issue of the adaptability of the appellee's claim to agricultural use and also erred in accepting the fact of cultivation during the appellee's fifth entry year; (2) the issues of whether the land was adaptable to agricultural use and whether cultivation occurred during the fifth entry year should be considered on appeal and decided in favor of the Bureau; (3) the examiner did not apply the proper legal standard of "cultivation" as required by the regulations; and (4) the decision by the examiner would eliminate any cultivation requirement for permafrost lands.

As to the appellant's first contention, the Bureau itself stated in its statement of reasons for appeal that the hearing examiner was constrained to adopt the finding of the Bureau of Land Management decision of December 4, 1967, that there was a crop in the fifth entry year and that therefore he could not find that the claim was not adaptable to agricultural use. Additionally, prior to the taking of the testimony at the hearing on remand, the government attorney made the following statement:

> I feel we have to not only admit but we have to -- are duty bound to recognize that there was cultivation in the fifth year as a result of these two decisions and if we say there was cultivation in the fifth year, then we of necessity are forced to admit that the land is capable or adaptable to agriculture. (Tr. 17).

On the basis of these factors, the examiner concluded that he could not go beyond the issue on remand and could not consider whether or not the land was adaptable to agricultural use or whether or not the entryman fulfilled the requirements for cultivation during the fifth entry year.

During the course of the hearing, counsel for the appellant stated with respect to the question of the capability of the soil on the appellee's homestead entry:

> [T]he Government is pretty well precluded from getting into that area by admitting cultivation in the fifth year. (Tr. 81)

Again, later in the hearing appellant's counsel stated:

> The only matter now in dispute is the adequacy of your methods for the fourth year, and whether or not you did in fact cultivate the fourth year, on that 20 acres. (Tr. 111)

Despite these concessions by government counsel, this Board is free, and is obliged, to consider everything contained in the record in determining all matters relevant thereto within the jurisdiction of the Department. 5 U.S.C. § 557(b) (1970); Knight v. U.S. Land Association, 142 U.S. 161, 177-178 (1891); United States v. T. C. Middleswart et al., 67 I.D. 232, 235 (1960). Cf. United States v. Ideal Cement Co., Inc., 5 IBLA 235, 244, 245 (1972).

The appellant argues that the examiner failed to apply the proper legal standards in defining "cultivation" as required by the regulations. We disagree with the appellant's position for the reasons set forth below.

The general homesteading requirements for the three-year proof of cultivation, 43 CFR 2511.4-3(a)(1) (1972) [formerly 43 CFR 2211.2-3(a) (1964)], prescribe that:

> Cultivation of the land in a manner reasonably calculated to produce profitable results is required for a period of at least 2 years. This must consist of actual breaking of the soil, followed by planting, sowing of seed, tillage for a crop other than native grasses, and, in areas where rainfall is inadequate, the application of such amounts of water as may reasonably be required to produce a crop.

> However, tilling of the land, or other appropriate treatment, for the purpose of conserving the moisture with a view of making a profitable crop the succeeding year, will be deemed cultivation within the terms of the act (without sowing of seed) where that manner of cultivation is necessary or generally followed in the locality. [3/]

The specific cultivation requirements for homesteading claims in Alaska, 43 CFR 2567.5(b) (1972) [formerly 43 CFR 2211.9-5(b) (1964)], do not contain the "summer following" language of the general regulations, but provide only that:

> Cultivation, which must consist of breaking of the soil, planting or seeding, and tillage for a crop other than native grasses, must include such acts and be done in such manner as to be reasonably calculated to produce profitable results.

However, 43 CFR 2567.2(e) (1972) [formerly 43 CFR 2211.9-1(f) (1964)] provides that all homestead claims in Alaska must be perfected in accordance with the three-year homestead law of June 6, 1912, 43 U.S.C. §§ 164, 169, 218 (1970), "and regulations thereunder." Therefore, except for the absence of the "summer fallowing" provision, the general regulations regarding the requirements for cultivation are not narrowed by the specific cultivation requirements for Alaska. Moreover, the above-quoted portion of the Alaska homestead regulations was not effective until May 29, 1963, after the entryman completed his first entry year. Prior to that time the only cultivation requirement which applied specifically to Alaska land was as to the amount of land to be cultivated. As to other requirements the general homestead regulations applied. See 43 CFR 65.17 and 166.23 (1962).

3/ The language "in a manner reasonably calculated to produce profitable results" was inserted into the general requirements by amendment on May 2, 1963, the day on which the entryman completed his first entry year. However, this language was merely a restatement of a requirement previously imposed by Departmental decisions. United States v. Robert R. Little, Sr., A-30466 (January 18, 1966). Charles Edmund Bemis, 48 L.D. 605 (1922).

The appellant contends that the regulations require an actual breaking of the soil, planting or sowing of seed, and tillage of the land in order for cultivation to have occurred and since the entryman never planted seed in the fourth entry year or sufficiently disturbed the soil to prepare a seedbed in the fourth entry year, he therefore failed to satisfy the requirements of the regulations.

It is true that the evidence shows that the appellee did not break the soil of his land or did not follow such a technique by planting, sowing of seed, and tillage for crop during the fourth entry year, but the general homestead regulations provide that, in certain cases, "cultivation" can exist without fulfilling these requirements. Tillage of the land or other appropriate treatment for the purpose of conserving of the moisture and with a view of making a profitable crop the succeeding year, without the sowing of seed, is deemed "cultivation" where the manner of cultivation is necessary or generally followed in the locality. 43 CFR 2511.4-3(a)(1) (1972), formerly 43 CFR 166.23(a) (1962).

Since there is no evidence that the entryman tilled the land for any purpose during the fourth entry year, the issue is thus narrowed to the question of whether the appellee's treatment of his land during his fourth entry year can be considered under the statute the equivalent of cultivation for the fourth year.

In order to determine whether the work done by the appellee during the fourth entry year constituted cultivation, we must examine the history of the appellee's efforts on his land.

The soil on the Grediagin homestead was classified in 1962 by Dr. Samuel Rieger, a State soil scientist for the Alaska Soil Conservation Service, as Copper River silt-loam which is classified as marginal for agricultural use because of wetness due to thawing permafrost which occurs generally at depths of between 30 to 72 inches. (Tr. 37, 38).

The appellee introduced into evidence a letter from the Alaska Agricultural Experiment Station to Mr. and Mrs. Grediagin dated September 9, 1968 (Ex. C-6), which attempted to give them some facts about the permafrost land which underlies most of the interior of Alaska. The relevant sections of the letter state:

> When the insulating cover is removed from a permafrost area, the soil below begins to thaw. As it thaws, water is released and the area becomes fluid. The soil does not stabilize until the permafrost has thawed to a sufficient depth to absorb the water present not removed by drainage.

> In soils underlain by relatively fine lake sediments or glacial till the movement of water downward and laterally through the soil and through artificial drainage is very slow. Under these conditions four or five years may be required for a cleared area to become stabilized. This practice of clearing land underlain by permafrost and let lay until dry enough for holding machinery before working and cropping was one extensively used in the Salcha area.
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> * * * Working of the soil before it is dry enough is almost impossible. Furthermore, it is detrimental to the soil structure and this will be reflected in poorer future crop growth. However, once an area is stabilized, adapted crops can be grown and in some cases much better growth can be expected than in dryer areas not underlain by the permafrost.

Dr. Rieger, who was called as a witness by both parties, stated that in general he agreed with the statements in the letter. He testified that clearing and removal of moss, trees, and brush are necessary in order to expose the ground to the heat of the sun and melt the permafrost. Large branches should be removed to prevent interference with farm machinery. (Tr. 104, 105).

Dr. Rieger testified that soil of the type on the Grediagin claim is good soil for farming once the excess water is removed, but that the real problem is drainage of the fields. (Tr. 9). He stated that he was not a ditch expert, but testified that ditches should be about 75 feet apart, 2 to 2 1/2 feet deep, running downhill the entire length and breadth of the claim. The ditches should be V-shaped with a flat bottom no more than 3 feet from lip to lip. (Tr. 62, 63). Dr. Rieger stated that using this method of ditching he would guess that it would take two, possibly three, years to drain the Grediagin claim. (Tr. 64). He estimated that without ditching it would take on the average of four years to dry out the type of soil on the Grediagin claim and that even after that time the soil would still be wet in early summer so that the seeding would have to be done after midsummer. (Tr. 86).

Dr. Rieger stated that for several years it would be impossible to get a D-7 bulldozer on the type of soil on the Grediagin claim unless it was done before the land thawed out too far, prior to June 1, but that during the initial phase of thawing it would be possible to work with the D-7 root raking and pushing stumps. (Tr. 108, 109).

Appearing for the appellee, Earl Barnard, a consulting engineer, testified that the general procedure for agriculture on permafrost land is first, to remove the insulation off the ground; second, to create surface drainage; and third, to provide a means of moisture evaporating from the soil by scarifying or light disking. These procedures, according to Barnard, create the stability needed to operate machinery over this type of soil. (Tr. 123, 124). Providing drainage ditches would lower the ground water table or hydraulic gradient of the soil. (Tr. 124). Barnard stated that he agreed with the description of cultivation on permafrost lands stated in the letter (Ex. C-6) from the Alaska Experimental Station introduced by the entryman. (Tr. 124-125).

Clifford W. Marcus, a soil conservationist for the Soil Conservation Service, Department of Agriculture, testified on behalf of the appellant that drainage was necessary for farming on permafrost lands, preferably ditches 80 to 100 feet apart running the entire length of the claim in the direction of the slope of the land. (Tr. 178, 179). He stated that one should not plant a crop when the soil is wet. It should be moist but not saturated. To prepare the seed bed for planting it should be disked or plowed. (Tr. 193-194).

The record shows that appellee hired a D-8 bulldozer in the spring of 1963 (Ex. C-1). Mrs. Grediagin testified that in the late spring of that year, while the ground was still frozen, the bulk of the work of clearing all of the 20 acres of appellee's fields was accomplished by felling the trees. (Tr. 205, 206) Many roots were therefore left in the ground. Appellee purchased a D-7 bulldozer and in the fall of 1963 did as much root-raking as possible and cleaning up of the cleared fields, but the D-7 kept bogging down due to the thawing permafrost. Therefore, in the fall of 1963 the appellee spent his time building a house and road rather than working in his fields. (Tr. 217, Exh. C-1).

In the early spring of 1964 the appellee did not work his fields because of the frozen condition of the moss-covered ground. After thawing occurred, the land was then too wet to make working with the D-7 feasible. The appellee felt it was more expedient to wait until just prior to the fall freeze-up when the ground would be the most dry. In the fall of 1964 he root-raked approximately two-thirds of his fields, but due to the wetness of the soil he could only make one pass with the D-7 over the land. A second pass would have resulted in the D-7 bogging down. In the spring of 1965 the same problem existed: the ground was frozen and after it thawed it was too boggy. In the fall of 1965 he root-raked all of his cleared fields and picked, pushed, hauled, and burned roots, but was unable to finish the pushing of roots into berm piles (narrow rows) because the ground was too wet. (Tr. 218; Ex. C-1).

The appellee testified that in the spring of 1966 he knew that he had to get his planting done in order to meet timely homestead cultivation requirements, 4/ but that conditions were the same as in previous years. The ground was initially too frozen and after it started thawing it would have to thaw 6 to 8 inches to do any good, but once it thawed to that depth, the D-7 vehicle would get bogged down. The appellee decided again to wait until the fall when the ground would be as dry as it would be just before the first frost. (Tr. 218, 219, 251, Ex. C-1).

In the fall of 1966 the appellee finished root-raking and pushing all the large roots to berm piles, after which he disked and seeded all of his fields. (Tr. 212, 219 Ex. C-1). Mrs. Grediagin testified that at this time the fields were damp but not wet. (Tr. 212). Barnard testified that he observed the Grediagins' land in the fall of 1966 and found that some of the land was in workable condition and other was still wet and in need of more drainage. (Tr. 127, 128). The hard red wheat crop planted in the fall of 1966 came up about 3 feet high intermixed with natural grasses. This was winter wheat which was a one-year crop only. The Grediagins planted 300 to 400 pounds of seed, and used 200 to 300 pounds of fertilizer. (Tr. 163, 164, 168).

The appellee testified that he utilized ditching for the purpose of drying his largest field, which was 14 acres in area. On the east edge of the field he developed a ditch 500 to 600 feet in length, 1 1/2 to 2 feet deep, and 10 feet 3 inches wide. This ditch was started in 1963, deepened four times, and finished in 1965. On the west edge of the 14-acre field the lower area was drained with a ditch 10 feet wide, 150 to 200 feet long, and 8 to 10 inches deep, which improved the natural drainage into Bear Creek. (Tr. 220, 221, 228-231, 235; Ex. C-5). The appellee testified that he did not run ditches the full length of his field because there were already natural ditches through the full length of the field which ran water into his ditches and also because excavated material resulting from ditching could hinder proper drainage. He stated that ditching also involved disturbing the top soil and turning up clay on top of it and the clay is almost sterile for growing purposes. Any attempt to remove the clay would have involved a prohibitive cost. (Tr. 232-235).

4/ The appellee's fourth entry year was from May 3, 1965, through May 2, 1966.

On the basis of the above recited evidence, we agree with the hearing examiner's finding that the entryman's work on the land during the fourth entry year constituted an acceptable method of preparing the soil for cultivation in the area under the climatic conditions prevailing where the claim was situated and that such work was calculated to produce profitable results. However, this finding is not necessarily sufficient to support the legal conclusion that the entryman fulfilled the requirements of cultivation as defined by the regulations. The regulations also require that such treatment on the land be for the purpose of "conserving the moisture with a view of making a profitable crop the succeeding year." 43 CFR 2511.4-3(a)(1) (1972), formerly 43 CFR 166.23(a) (1962).

We thus come to the critical issue for our decision: Is the case at bar sufficiently analogous to the "summer fallowing" concept of 43 CFR 2511.4-3(a)(1) (1972) so that cultivation under the statute includes not only treatment for the purpose of conserving the moisture, but also for the purpose of drying the land to make it suitable for the planting of a crop? The hearing examiner recognized that the method of cultivation used by the entryman was different from the method expressly described in the regulations, but he believed that the principle was the same and, in essence, that the practicality of the steps taken should be more determinative than a literal reading of the regulations.

Homestead laws should be liberally construed in favor of the entryman. Stewart v. Penny, 238 F. Supp. 821 (D.C. Nev. 1965).

We believe that the homestead laws can be reasonably construed to provide that treatment of permafrost land for the purpose of draining the land with a view of making a profitable crop the succeeding year can be considered to be "cultivation" of the land where this manner of cultivation is necessary in the locality.

We see no reason why the treatment of the land by the entryman here should be viewed any differently from a situation where an entryman treats land in an arid area for the purpose of conserving the moisture in the land. As the Department stated in John A. Bartel, A-29664 (October 11, 1962):

> [T]he obvious purpose of the homestead laws and regulations thereunder is the agricultural development of the land with the raising of crops. This purpose must be kept in mind in considering the showings of the appellant.

Even granting, arguendo, that the treatment of the soil does not literally comport with the governing regulations, it seems clear that in the exercise of equitable adjudication the variation can, and ought to, be waived. See 43 CFR 1871.1-1 (1972). Cf. Richard Dean Lance v. Udall, Civil No. 1864-N, January 23, 1968 (D.C. Nev.). In essence, we find substantial compliance with the cultivation requirements of the homestead laws. The permafrost character of the land is indeed an "obstacle over which the party had no control * * *." 43 CFR 1871.1-1 (1972).

This section reads as follows:

§ 1871.1-1 Cases subject to equitable adjudication.

> The cases subject to equitable adjudication by the Director, Bureau of Land Management, cover the following:
>
> (a) Substantial compliance: All classes of entries in connection with which the law has been substantially complied with and legal notice given, but the necessary citizenship status not acquired, sufficient proof not submitted, or full compliance with law not effected within the period authorized by law, or where the final proof testimony, or affidavits of the entryman or claimant were executed before an officer duly authorized to administer oaths but outside the county or land district, in which the land is situated, and special cases deemed proper by the Director, Bureau of Land Management, where the error or informality is satisfactorily explained as being the result of ignorance, mistake, or some obstacle over which the party had no control, or any other sufficient reason not indicating bad faith, there being no lawful adverse claim. [Emphasis supplied.]

There is no question in this case as to the good faith of the Grediagins in attempting to develop their land for agricultural purposes. We have also found that the Grediagins' treatment of the land during the fourth entry year was with a view of making a profitable crop the succeeding year. We find that in all respects the appellee met the requirements of the homestead laws, including cultivation for the fourth entry year, and is entitled to patent.

Our decision in this case will not result in the abandonment of the cultivation requirements for permafrost land as the appellant contends. The appellant expresses concern that an entryman could perform a limited treatment of permafrost lands for a period of five years while the land is in the process of drying and that after this time when he has received his patent he would no longer have any incentive to develop the land.

An entryman is required to treat the land in a manner which is appropriate "with a view of making a profitable crop the succeeding year." [Emphasis supplied]. 43 CFR 2511.4-3(a)(1) (1972). Therefore, an entryman cannot satisfy the cultivation requirements for any given year without establishing that a profitable crop could reasonably be expected to be raised the succeeding year.

In the case at bar, having found that all other requirements of the homestead laws have been met, we are concerned only with whether there was cultivation during the appellee's fourth entry year. Our holding should not be construed to stand for the proposition that the cultivation requirements on permafrost lands can be met by doing all that is necessary to dry the land in preparation for the raising of crops where it is clear that the land will take at least three to four years to dry. For instance, our holding does not mean that, even if the entryman had not been credited with two years cultivation for his military service, the work on the land which he did during his first three entry years would have satisfied the cultivation requirements.

It is not sufficient for an entryman to show that during one entry year the only work that he could possibly have accomplished on the land was to allow the land to dry. This is not sufficient for purposes of satisfying the cultivation requirements for that year unless it could be shown that a reasonable bona fide effort was made to produce a profitable crop in the succeeding entry year with a reasonable expectation that a profitable crop would result. In other words, an entryman's acts as to cultivation must be found to have been reasonably calculated to produce profitable results, despite his failure to produce a useful crop. Cf. United States v. Dale Gladys Garrett, A-31064 (May 28, 1970).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 D.M. 13.5, 35 F.R. 12081), the decision of the hearing examiner is affirmed.

Frederick Fishman
Member

We concur:

Anne Poindexter Lewis
Member

Joseph W. Goss
Member